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AZ CORP COMMISSION
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The Solar Alliance

TO: Arizona Corporation Commission
FROM: The Solar Alliance
DATE: 8-10-09
DOCKET NO. E-20690A-09-0346

IN THE MATTER OF THE APPLICATION OF SOLARCITY FOR A DETERMINATION THAT WHEN IT PROVIDES SOLAR SERVICE TO ARIZONA SCHOOLS, GOVERNMENTS AND NON-PROFIT ENTITIES IT IS NOT ACTING AS A PUBLIC SERVICE CORPORATION PURSUANT TO ART.15, SECTION 2 OF THE ARIZONA CONSTITUTION

The Solar Alliance (Alliance) appreciates the opportunity to address the Arizona Corporation Commission (Commission) with regard to SolarCity' application for a determination that it not acting as a public service corporation when it provides Solar Service Agreements (SSAs) to public schools, governments and non-profit entities, Docket No. E-20690A-09-0346.

Initially, the Alliance commends the Commission for expediting the consideration of SolarCity's application. The Commission is undoubtedly aware that Arizona Public Service (APS) has over 25 megawatts of applications for incentives to develop non-residential distributed generation solar systems, and that this represents more solar generation that is currently installed in all of Arizona. Well over half of the systems proposed for APS's incentives call for some form of an SSA as their financing mechanism. We recently learned that Tucson Electric Power has received applications for incentives for an additional 10 megawatts of distributed solar generation systems. Together these systems would represent a monumental step forward in Arizona's efforts to achieve the Commission's renewable resource goals.

The Alliance strongly supports approval of the SolarCity application. The application provides an excellent opportunity for the Commission to confirm that those who offer SSAs are not acting as public service corporations. "However, because SolarCity's application is limited to SSAs to be provided to two public schools, the Alliance would like the determination and order to state specifically the relevant criteria that are used to determine if a company is acting as a public service corporation so as to be most instructive to the solar industry as a whole." Therefore, the Alliance suggests that the Commission consider the following items when processing and ruling on SolarCity's application:

- The Commission should begin its analysis with a mindset that an entity is not considered a public service corporation until it is shown that there is a need to protect the public through regulation as a public service corporation. Much like a defendant is "innocent until proven guilty" in our judicial system, when examining whether an entity is a public service corporation, the Arizona Supreme Court has confirmed that "[f]ree enterprise and competition is the general rule. Government control...[is] the exception."[1] Therefore, unless the Commission concludes that government regulation of SolarCity is necessary to preserve services that are indispensable to the public or to ensure adequate service at fair rates where there is a disparity in bargaining power[2], it should conclude where it begins –

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1 *Ariz. Corp. Comm'n v. Nicholson*, 108 Ariz. 317, 321, 497.P.2d 815 (1972).

2 *See Southwest Transmission Co-operative, Inc. v. Ariz. Corp. Comm'n*, 213 Ariz. 427, 432, ¶ 24, 142 P.3d 1240, 1245 (App. 2006).

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- with the view that by offering its SSAs, SolarCity is not operating as a public service corporation.
- The Commission's review of SolarCity's application should be broad enough that the Commission can be confident it is fully aware of the relevant facts that it must consider in arriving at a conclusion as to whether SolarCity would be acting as public service corporation. But if the Commission ultimately issues an order concluding that SolarCity is not operating as a public service corporation, it should set forth in its written order only the factors which it found relevant to its evaluation. For example, if the Commission believes that the tax status of the SSA customer (a taxable entity, or a non-taxable entity) is not relevant to the outcome, it should either explicitly so state in its order, or not refer to the tax status of the SSA customer in its order. A Commission order that states that SolarCity's SSA customer is a non-taxable public school, but does not clarify whether the tax status of the customer is or is not a relevant factor in the Commission's analysis, would be of little guidance to other entities that might offer SSAs to private (taxable) commercial customers.
- Both of the specific contracts filed by SolarCity include option to purchase terms, whereby the customer has an option to purchase the solar facility at certain points over the life of the agreement. While the Alliance's previous application did not include an option to purchase as factor on which it sought a determination, the Alliance does not object to the Commission indicating that an option to purchase is a relevant contract term when evaluating whether an SSA-provider is not a public service corporation.

There are dozens, if not hundreds, of pending SSA projects on commercial buildings that will likely begin development over the next year in APS's and TEP's service territories. The Alliance understands that the Commission must evaluate SolarCity's adjudication application on the basis of the unique facts presented by the application. But by precisely stating the facts that the Commission finds to be relevant to support its ruling, the Commission can provide useful guidance to the solar industry at large. Sufficient clarity on the question may provide adequate assurances to financial backers to allow future SSAs to proceed to construction without the necessity of submitting those SSAs to the Commission for individual adjudication.[3]

Respectfully submitted on behalf of the Solar Alliance,

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[3] Of course, the Alliance recognizes that absent Commission rulings on such individual applications, the Commission is not bound to any conclusion on whether any particular SSA provider is or is not a public service corporation.